

## International IP Policy

### US Perspectives

#### [“Innocence of Muslims” Creates Copyright Controversy In US](#)

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By [Steven Seidenberg](#) for Intellectual Property Watch

When “Innocence of Muslims” first appeared online, the video provoked outrage among millions of Muslims around the world. Now the consternation has spread to many copyright experts, internet firms, news organisations, and entertainment companies, who assert that a recent 9th Circuit decision about the movie makes a major change in US copyright law, with terrible consequences for the internet, media, and free speech. Others state that the ruling makes no change at all in US law.

If Cindy Lee Garcia is to be believed, the facts in *Garcia v. Google* are horrendous. The actress accepted a small role in a low-budget amateur film, after being told by Mark Basseley Youssef, the film’s writer and producer, that this would be an adventure film set in ancient Arabia. Instead, however, Youssef edited and redubbed the movie’s footage to create two 13 minute movie “trailers” that excoriated Islam in highly offensive ways. Garcia, for instance, appeared in these trailers for five seconds, and her performance was partially redubbed so that her character asked, “Is your Mohammed a child molester?”

After Youssef posted these trailers of “Innocence of Muslims” on YouTube in July 2012, outraged Muslims around the world protested. An Egyptian cleric issued a fatwa, calling for the murder of everyone involved with the trailers. Garcia began receiving death threats.

Garcia, like the other actors in the trailers, publicly condemned “Innocence of Muslims” and declared she had been duped into appearing in it. She repeatedly asked Google to remove the offensive trailers from YouTube. Google refused, noting that under the US Digital Millennium Copyright Act, only the copyright owner had the right to submit takedown notices and that Garcia did not own the copyright in the trailers.

Garcia sued Google, seeking to force the company to remove the trailers from YouTube. She lost in federal district court, but on 26 February, the 9th Circuit Court of Appeals [ruled](#) [pdf] for Garcia and ordered Google to remove the trailers.

The ruling ignited a firestorm of criticism. “This decision came down, and the law professors’ listserv exploded,” said Prof. Jessica Litman of University of Michigan Law School.

“A small number of copyright experts have tried to find a way to rationalise the decision. Everyone else in the copyright community has reacted with shock because this decision is so grossly wrong,” said Prof. Eric Goldman of Santa Clara University School of Law. “It broke copyright law at its core. It either changes multiple doctrines of copyright law or it is wrong.”

But Prof. Justin Hughes of Loyola Law School, in Los Angeles, insists that the ruling is unexceptionable.

“I don’t understand the hoopla about this,” he said. “As an interpretation of American copyright law, it is completely unsurprising.” And he claims to be in good company, because his position is supported by the US government. “Every copyright expert in the US government from the mid-1990s on would consider this a no-brainer. I’m talking the Department of Justice, the USPTO, the US Trade Representative – everyone thinks this is already the law in America,” said Hughes, who served in the Obama administration as senior advisor to the under secretary of Commerce for IP and who strongly supports the 9th Circuit’s decision.

### **A Separate Piece of Copyright**

All sides in this controversy agree on one thing: the 9th Circuit’s ruling does not grant Garcia a copyright interest in the movie trailer. Instead, the court held by a vote of 2-1 that Garcia probably owns a separate copyright in her performance. Although she was speaking words written by someone else (and did not even say some of the words that overdubbed her lines), Garcia’s five second performance was creative enough to be copyrightable. When this creative performance was fixed in a tangible medium, it became copyrighted and Garcia owned the copyright, according to the court. As a copyright owner, she could properly object to her performance appearing on YouTube without her consent and she could demand the company remove the trailers containing this performance.

Many copyright experts see major flaws in the court’s reasoning. For instance, there is the question of fixation.

“The [Copyright Act](#) is very specific about who can own a copyright: the person who fixes a work of authorship in a tangible medium of expression. This fixation must be by the work’s author or on the author’s behalf,” Goldman said. “Here, Garcia’s performance was not fixed in any medium except the video recording. So in order to say she owns the copyright, Garcia must show the recording was done on her behalf. I don’t see how that could be done because she just had a bit part in the movie. It was the director who got the movie camera, hit the play button, etc. Even if she consented to the fixation, that doesn’t mean she authorized it.” He adds that finding Garcia authorised the fixation “would be crazy.”

The court, however, didn’t go that far. Instead, it sidestepped the fixation issue. The court stated in a footnote that because neither party raised the fixation issue, the judges didn’t address it.

But ruling that Garcia had a copyright in her performance without resolving the fixation issue was wrongheaded, according to Goldman. “The main thing the court got wrong was its punt on the fixation issue. That issue is dispositive, so the court’s ruminations [in this opinion] should be considered dicta,” Goldman said.

### **Searching for Precedents**

Then there’s the question of whether actors can copyright their performances – and do so separately from the copyrights in the video recordings containing those performances. According to many experts, such performances do not give rise to separate copyrights under US copyright law.

There are no US legal precedents holding that actors have independent copyrights in their recorded audiovisual performances, according to Prof. Rebecca Tushnet of Georgetown Law School. In prior cases, when actors sought copyright protection for their performances in movies and other recorded audiovisual works, the courts examined whether the actors were joint authors of these audiovisual works – and the courts rejected these joint authorship claims. Thus Garcia’s claim to an independent copyright is an issue of first impression, according to Tushnet.

The US Copyright Office disagrees. On 6 March, about a week after the 9th Circuit handed down its decision in *Garcia*, the Copyright Office denied Garcia's application to obtain a separate copyright registration for her performance in "Innocence of Muslims."

Explaining the rejection, the Copyright Office stated that "longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture."

The Copyright Office, however, does not have the final say on this issue. The courts do. In making their decisions, the courts give some deference to the Copyright Office's view, but such deference is "often pretty weak," Tushnet said. She added that the Copyright Office decision on Garcia's application "may have rhetorical purchase, but the 9th Circuit is going to do what it wants to do."

The Copyright Office is not alone in thinking that this issue has been long-settled. But copyright experts are divided on whether the precedents support or contradict Garcia's copyright claim.

Most experts seem to think that Garcia cannot have a separate copyright in her recorded audiovisual performance. But Prof. Litman states that there are plenty of precedents supporting Garcia's claim.

"There's a line of copyright cases that hold that copyright protects the characters embodied in motion pictures.... I think those cases are wrong, but assuming one follows them, it isn't even a little stretch to conclude that Garcia's performance includes copyrightable elements authored by her," Litman said.

That line of cases, however, recognises that the copyright in an audiovisual work protects the characters displayed therein. The cases say that if you copy a character from the movie, "you are copying enough of the movie to be infringing," Tushnet said. These cases do not recognise a separate copyright in characters, much less separate copyrights in characters that are owned by someone other than the movie's copyright owner.

Yet if a movie's copyright protects the movie's characters – if the characters possess sufficient originality and distinctiveness to receive copyright protection – why couldn't the characters receive separate copyright protection? One could argue that, according to this line of cases, characters satisfy the requirements for copyright protection (ignoring, for the moment, the issue of fixation). If this is so, the characters in a movie should be entitled to separate copyright protection. And since performances in a movie can be as original and distinctive as characters, those performances should similarly be eligible for separate copyright protection. In short, this line of cases doesn't directly address Garcia's copyright claim, but could be read as supporting her claim.

## **The China Connection**

One international treaty signed by the United States clearly supports Garcia's copyright claim. The [Beijing Treaty on Audiovisual Performances](#) grants performers broad rights in their performances that have been recorded in audiovisual works.

The treaty endows performers with exclusive rights over when and how their recorded performances can be copied, distributed or otherwise made available to the public. In addition to these copyright interests, the treaty also provides moral rights that allow a performer "to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation."

Under these provisions, Garcia definitely had a copyright in her performance and could order Google to remove it from YouTube. But the treaty has not gone into effect.

The Beijing Treaty was adopted on 26 June 2012 (and is managed by the World Intellectual Property Organization). It has been [signed](#) by the European Union and 71 nations, including China, France,

Germany, Italy, Mexico, the United Kingdom, and the United States. The treaty goes into effect, however, only when it has been ratified by 30 eligible parties. So far it has been ratified by just two nations, Botswana and Syria.

According to the USPTO, US law already provides performers with most of the rights laid out in the treaty. The agency [declared](#), on the day the treaty was adopted, that “Under US law, actors and musicians are considered to be ‘authors’ of their performances providing them with copyright rights,” and that “US law is already generally compatible with the [Beijing Treaty’s] provisions.”

The USPTO’s analysis of US copyright law is certainly not conclusive. For one thing, it seems to contradict the position taken by the US Copyright Office when it rejected Garcia’s copyright registration. Moreover, the USPTO deals with patents and trademarks, so it is unclear that the courts would defer more to that agency’s interpretation of copyright law than to the Copyright Office’s interpretation. Still, the USPTO statement does indicate that at least some high level US officials involved in negotiating the Beijing Treaty thought its provisions accorded with US law.

US copyright experts, however, do not disagree on just whether *Garcia* is good law. They also vehemently disagree on the decision’s ramifications. Many experts say it impairs free speech. Others say it does not. That controversy will be discussed in a second article to follow.

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